SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., *Petitioners,*

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	11
Conclusion	32

Appendix A, Majority and Dissenting Opinions of the Supreme Court of Pennsylvania and Judgment .. 1a

Appendix B, Opinion and Order of Court of Common Pleas of Blair County, Pennsylvania 12a

Appendix C, Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, et seq.) 23a

AUTHORITIES CITED

Cases:

Aetna Freight Lines v. Clayton, 228 F. 2d 385 (C.A. 2), cert. denied, 351 U.S. 950 26
Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W. 2d 785 12
American Federation v. Swing, 312 U.S. 321 17
Arlan's Dept. Store of Charleston, Case No. 9-CA-3308, May 25, 1965 23
Brown Shoe Co. v. United States, 370 U.S. 294 9
Building Service Union v. Gazzam, 339 U.S. 532 14
Chauffeurs Local Union 795 v. Newell, 356 U.S. 341 ... 14
Division 1287, Amalgamated Association v. Missouri, 374 U.S. 74 31
Fafnir Bearing Co. v. N.L.R.B., 362 F. 2d 716 (C.A. 2) 21
Freeman v. Retail Clerks Union Local No. 1207, 58 Wash. 2d 426, 363 P. 2d 803 12
Garner v. Teamsters, 346 U.S. 485 20
Hague v. C.I.O., 307 U.S. 496 16
Hillsborough Township v. Cromwell, 326 U.S. 620 9

Page

Houston Building & Construction Trades Council (Claude Everett Const. Co.), 136 NLRB 321 26
J. C. Penney Co., 151 NLRB 53 4
Local No. 438 Construction Union v. Curry, 371 U.S. 542 8
Local 761, I.U.E. v. N.L.R.B., 366 U.S. 667 28
Lombard v. United States, 373 U.S. 267 16
Los Angeles Meat Drivers Union v. United States, 371 U.S. 94 9
Marsh v. Alabama, 326 U.S. 501 15
Marshall Field & Co., 98 NLRB 88, enforced as modified 200 F. 2d 375 (C.A. 7) 21
Maryland v. Williams, 44 LRRM 2357 ..... 13, 16
Meatcutters v. Fairlawn Meats, 353 U.S. 20 31
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 ..... 9, 14
Moore Dry Dock Co., 92 NLRB 547 ..... 28, 29
Moreland Corp. v. Retail Store Employees Union Local No. 444, 16 Wis. 2d 499, 114 N.W. 2d 876 12
N.L.R.B. v. Babcock & Wilcox, 351 U.S. 105 ..... 22, 23
N.L.R.B. v. Cities Service Oil Co., 122 F. 2d 149 (C.A. 2) 21
N.L.R.B. v. Denver Bldg. Trades Council, 341 U.S. 675 28
N.L.R.B. v. Fruit & Vegetable Packers, 377 U.S. 58 18, 19, 20
N.L.R.B. v. Hearst Publications, 322 U.S. 111 20
N.L.R.B. v. International Rice Milling Co., 341 U.S. 675 28
N.L.R.B. v. Lake Superior Corp., 167 F. 2d 147 (C.A. 6) 21
N.L.R.B. v. Local Union No. 55, 218 F. 2d 226 (C.A. 10) 29
N.L.R.B. v. Service Trade Chauffeurs, 191 F. 2d 65 (C.A. 2) 29
N.L.R.B. v. Stowe Spinning Co., 336 U.S. 226 ..... 21, 23
N.L.R.B. v. United Aircraft Corp., 324 F. 2d 128 (C.A. 2), cert. denied, 376 U.S. 951 21
National Woodwork Manufacturers Assn. v. N.L.R.B., 386 U.S. 612 29
Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 25
Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 9
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 ... 9
Retail Fruit & Vegetable Clerks (Crystal Palace Market), 116 NLRB 856, enforced 249 F. 2d 591 (C.A. 9) 29
Sales Drivers v. N.L.R.B., 229 F. 2d 514 (C.A.D.C.), cert. denied, 351 U.S. 972 29

Page

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 30
Schneider v. Irvington, 308 U.S. 147 18
Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31, 40 Cal. Rep. 233, 394 P. 2d 921 ..... 12, 18, 22
Seafarers International Union v. N.L.R.B., 265 F. 2d 585 (C.A.D.C.) 29
Sears, Roebuck & Co., 151 NLRB 1356 4
St. Louis, Iron Mountain & So. Ry. Co. v. Southern Express Co., 108 U.S. 24 9
Steelworkers v. N.L.R.B., 376 U.S. 492 19
System Federation v. Wright, 364 U.S. 642 9
Thornhill v. Alabama, 310 U.S. 88 ..... 13, 17, 23
Weis Markets, 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708 4
Youngdahl v. Rainfair, 355 U.S. 131 ..... 20, 30

STATUTES:

28 U.S.C. § 1257 2

National Labor Relations Act (61 Stat. 316, 29 U.S.C. § 141, *et seq.*) 3

MISCELLANEOUS:

Gould, Union Activity on Company Property, 18 Vand. L. Review 73, 119-135 (1964) 13
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Notes, 73 Harv. L. Rev. 1216 (1960); 1960 Duke L. J. 310; 48 Va. L. Rev. 133 (1962); 1962 U. Ill. L. Rev. 475; 3 Bost. Col. Ind. Com. L. Rev. 289 (1962); 49 Va. L. Rev. 1571 (1963); 5 Bost. Col. Ind. Com. Law Rev. 768 (1964) 13
Regulation of Demonstrations, 80 Harv. L. Rev. 1773 (1967) 13
Shopping Centers and Labor Relations Law, 10 Stan. L. Rev. 694 (1958) 13, 31
Wall Street Journal, June 13, 1967, p. 1, Col. 5 32

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v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Amalgamated Food Employees Union Local 590, AFL-CIO, and others [1] pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above-entitled case on March 21, 1967.

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[1] Also named in the complaint as defendants, and additional petitioners here, are "John Doe and Richard Roe, said names being fictitious, true names unknown, said persons being officers, employees, agents, servants and pickets employed by defendant Union, and any other individuals, labor unions or labor organizations acting in concert" (R. 1).

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, three Justices dissenting, is reported at 227 A.2d 874 (*infra,* p. 1a). The opinion of the Court of Common Pleas of Blair County, Pennsylvania, is unreported (R. 87-99, *infra,* p. 12a).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on March 21, 1967 (*infra,* p. 6a). An order was entered on June 6, 1967 by Mr. Justice William J. Brennan, Jr., extending the time for filing a petition for a writ of certiorari to August 18, 1967. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). See, *infra,* p. 9, n. 5.

QUESTIONS PRESENTED

A state court injunction prohibits, as trespass on private property, peaceful picketing at the premises of a store located within a shopping center informing the public that the store "is Non-Union, these employees are not receiving union wages or other union benefits." The questions presented are (1) whether this prohibition abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution; (2) whether the state court is without jurisdiction to adjudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board; and (3) whether the prohibition forbids the exercise of the fed-

eral right to engage in "concerted activities for . . . mutual aid or protection" guaranteed by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, *et seq.*), are set out in Appendix C (*infra*, pp. 23a-26a).

STATEMENT

Logan Valley Mall is a shopping center (R. 87, *infra*, pp. 1a, 12a). Owned by Logan Valley Plaza, Inc. (Logan), it is a newly-developed and sizeable commercial complex (R. 87, 86 *infra*, p. 12a). Its perimeter spans about 5,740 feet or 1.1 miles (R. 86). It is situated in Logan Township, near the City of Altoona, Pennsylvania, at the intersection of two public highways known as Plank Road (U.S. Route 220) to the east and Good's Lane to the south (R. 87, *infra*, pp. 1a, 12a). Plank Road is a heavily traveled highway, with cars moving at very good speed (R. 45, 50). Of the five entrances to the shopping center, three are located on Plank Road and two on Good's Lane (R. 86, 59-60, 49-50). The shopping center is separated from the highways by earthen berms, unbroken except for the five paved entrances providing ingress and egress between the highways and the center (R. 88, *infra*, p. 12a). At entrances 1 and 2, the berm is 15 feet in width from the highway to the edge of the ditch; at entrances 3, 4, and 5, 12 feet in width; and the paved entrances are 20 feet in width (R. 35-37).

At the time of the events in this case, the shopping center was occupied by Weis Markets, Inc. (Weis) and Sears, Roebuck and Co. (Sears) (R. 88, *infra*,

p. 12a). Other occupants were of course expected (R. 88, 51, 59, 73, *infra,* pp. 1a, 4a, 13a).[2] Sears operates a department store and an automobile service station (R. 88, *infra,* p. 12a). Weis operates a supermarket engaged in selling food and sundry household articles (R. 88 *infra,* pp. 1a; 13a). The business operations of Weis and other occupants of the shopping center affect interstate commerce and their labor relations are therefore governed by the National Labor Relations Act.[3]

The Weis property consists of an enclosed modern market building with an open but covered porch running north and south along its front and a pick-up zone

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[2] We are informed that at present, in addition to Weis and Sears, the shopping center is occupied by the following 15 enterprises: Penney's, First National Bank, Ormond's Girl Shop, Murphy's 5 & 10, Mall Barber Shop, Thrift Drugs, Miller's Auto Supply, Kinney's Shoe Store, Father N Son Shoe Store, Seni's Hair Fashions, De Roy's Jeweler, Singer Sewing, Lester's Dress Shop, Schiff's Shoes, and Book and Record Shop.

[3] The NLRB has often exercised jurisdiction over Weis. *Weis Markets,* 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708. Weis is "engaged in the sale of food and sundry household articles, employing approximately two thousand two hundred persons in its business, and having its principal place of business at . . . Sunbury, Pennsylvania" (R. 6). Its store at the shopping center, No. 40 (R. 20), is one of twenty-nine in its Northern Division (R. 38, 28). In the overall Weis "operates 52 retail food markets (12 in shopping centers) in 36 communities in central Pa. within a 125-mile radius of Sunbury. All stores sell groceries, meats, bakery products, produce, dairy products, frozen foods and health and beauty aids, tobacco and certain other nonfood items"; its net sales in 1965 were $111,024,294 and its net income $4,659,103; it has 3,055,000 shares of common stock listed on the New York Stock Exchange. Standard & Poor's, Corporation Records, T-Z, p. 2751 (1966). Sears is of course a national enterprise over which the NLRB regularly exercises jurisdiction (*e.g., Sears, Roebuck & Co.,* 151 NLRB 1356), as is J. C. Penney Co., identified as an occupant of the shopping center on the latter's plan (R. 86, 79; *e.g., J. C. Penney Co.,* 151 NLRB 53).

directly along the porch for loading purchased goods into customer's cars (R. 88, *infra*, pp. 1a, 13a). The pick-up zone, 4-5 feet in width and 30-40 feet in length, is marked off with yellow lines (R. 55, *infra*, p. 1a, n. 2); it can accommodate three, possibly four, cars (R. 55). Between the supermarket area and the highway berms are extensive parking lots to the east and south of Weis; these macadam lots have parking spaces and driveways distinctly lined off on the ground; these areas constitute a common parking lot for Weis and Sears customers, and eventually for other stores in the center as they open (R. 88, *infra*, pp. 1a, 13a). There are also pedestrian ways (R. 86). The distance across the parking lots from the highway entrances to the Weis property is 350 feet at entrances 1 and 2, further from entrance 4, and 450-500 feet at entrance 5 (R. 34-35). Entrance 5 is the main entrance to the shopping center, and the most heavily used (R. 39, 60). Except for entrance 3, used primarily for access to the Sears automobile service station (R. 63-64, 40), all entrances are used by customers shopping at both Weis and Sears, and eventually other stores (R. 39-41, 50, 63-64).

On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees (R. 89, *infra*, p. 13a). Beginning on December 17, 1965, small groups of men and women picketed the Weis store within the shopping center wearing placards reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits. Amalgamated Food Employees Union Local 590" (R. 89, 29, *infra*, pp. 13a, 2a, n. 3). They walked back and forth in front of the Weis supermarket, primarily at the pick-up zone adjacent to the covered porch (R. 89, *infra*, p.

13a). The average number of pickets was variously estimated at 5, 6, or 7 (R. 39, 61-62). All were members of petitioner Union (R. 66). They were employed by A & P, Quaker, and Acme, neighboring stores, and volunteered to picket at Weis on their own time (R. 66-68, 73-74, *infra,* p. 2a, n. 3). They were not and never had been employees of Weis (R. 92, *infra,* pp. 6a, 13a). The picketing was peaceful and unaccompanied by either oral threats or actual violence (R. 90, *infra,* pp. 1a, 2a, 14a).

A few days after it opened for business on December 8, Weis posted a sign between its entrance and exit doors reading, "No trespassing or soliciting is allowed on Weis Market porch or parking lot by any one except Weis employees without the consent of the management" (R. 33-34, *infra,* p. 5a). On December 20, Weis' Assistant General Superintendent approached the individual he thought was in charge of the arriving pickets (R. 32). After ascertaining that they intended to picket, the superintendent stated, "Do you know you are picketing on private property? . . . [T]his property belongs to Weis Markets. . . . [The Weis property ends] Out along the highway right at the edge of the macadam. . . . If you want to picket do your picketing out there" (R. 33).

On December 27, 1965, at the instance of Weis and Logan, the Court of Commons Pleas of Blair County issued an *ex parte* injunction prohibiting all picketing within the shopping center, and in consequence limiting the picketing to the highway berms (R. 6-21, 98, *infra,* pp. 14a, 2a, n. 4). The order enjoined the Union and its members *inter alia* from (R. 20):

> (a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., Store

No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area.

(b) Picketing and trespassing upon the private property of plaintiff Logan Valley Plaza, Inc. located at Logan Valley Mall, including parking area and all entrances and exits leading to said parking area.

After the *ex parte* injunction issued, picketing was conducted on the highway berms at the entrances to the shopping center, two pickets at entrance 5, two at entrance 4, and one or two at entrances 1 and 2 (R. 62). Entrance 3 primarily served the Sears automobile service station, and when that fact was ascertained, picketing at that entrance was discontinued (R. 64). When picketing at the highway entrances began, leaflet distribution at these points was also commenced (R. 58-59). The handbills read: "We appeal to our friends and members of organized labor NOT TO PATRONIZE this non-union market". . . . "Please Patronize Union Markets! A & P—Quaker—Acme". . . . "We still retain the right to ask the public NOT to patronize non-union markets and the public has the right NOT TO PATRONIZE non-union markets" (R. 89, *infra*, pp. 13a-14a, 2a, n. 3).

On January 4, 1966, the Union moved to dissolve the *ex parte* injunction (R. 22-26). It urged that (1) "the activity here complained of amounts to nothing more than peaceful, informational picketing by Union Members for the purpose of informing the public of the terms and conditions of employment of the employees of Weis Markets, Inc., at said store . . ." (R. 22-23); (2) "the area whereon the defendant was conducting a peaceful and lawful picketing in a shopping

center, pedestrian and parking area and as such, constitutes quasi-public property even though privately owned" (R. 24); (3) "picketing [at the highway entrances] indirectly affects other tenants of the Logan Valley Plaza, Inc. Shopping Center which in no way is desired by the defendant" (R. 25); and (4) "by reason of the Labor Management Relations Act, 29 USCA §§ 141 et seq., your Honorable Court is without jurisdiction in this labor dispute whatsoever . . ." (R. 26).

After an evidentiary hearing the Court of Common Pleas ruled against the Union (R. 87-100, *infra*, p. 12a). It held that the picketing "constitutes a trespass on the Mall premises and is designed, at least in part, to pressure Weis Markets, Inc. to compel its employees to join a union" (R. 99, *infra*, p. 21a).[4] It decided that the pickets were not within the class to whom the shopping center had been opened; "Such a commercial premises may properly be classified as quasi-public only for the use of lessees, employees and business invitees, and those not falling within either group are not upon the premises for the purposes for which the enterprise was constructed and intended" (R. 95-96, *infra*, pp. 18a-19a). It therefore rejected the Union's argument that "a shopping center constitutes quasi-public property and, therefore, picketing on the Mall premises is not a trespass, but merely a lawful exercise of the constitutional right of free speech" (R. 91, *infra*, p. 15a). It did not address itself to the Union's claim that paramount federal law "has removed this type of labor

[4] Based on the finding that the picketing was in part designed to coerce union membership, the conduct is clearly within the area preempted by the NLRB. *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542. However, in affirming the *nisi prius* judgment, the Pennsylvania Supreme Court disclaimed reliance on this finding (*infra*, p. 6a).

dispute from the sphere of state action and thereby precludes your Honorable Court from entering any decree whatsoever in this matter" (R. 26). Accordingly, the Court of Common Pleas entered an order "making permanent the injunction as previously decreed" (R. 98, *infra*, p. 20a).[5]

On appeal, three Justices dissenting, the Supreme Court of Pennsylvania affirmed the *nisi prius* decree

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[5] The decree entered by the Court of Common Pleas continued the injunction in effect "until further adjudication of this case or until further order of this Court. . . ." (R. 100a). This explicit retention of jurisdiction to vacate or modify an injunction operating *in futuro* is familiar equity procedure (*System Federation* v. *Wright*, 364 U.S. 642; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 298; *Los Angeles Meat Drivers Union* v. *United States*, 371 U.S. 94, 103), and does not detract from the finality of the decree (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307, n. 4; *St. Louis, Iron Mountain & So. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24; *cf., Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70, n. 3). Furthermore, treating the *nisi prius* decree as a preliminary injunction, the judgment is nevertheless final. First, requisite finality exists because the judgment constitutes "a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made that the jurisdiction of the state is preempted by federal law and by the exclusive power of the National Labor Relations Board . . . ." *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542, 552, 543-550. Second, apart from preemption, there is in any event "nothing more of substance to be decided in the trial court," and the judgment is therefore final for this independent reason. *Id.* at 550-551. The federal questions "have reached a definitive stop" (*Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71); as the case comes here, "the federal question is the controlling question; 'there is nothing more to be decided'" (*Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382). Lastly, well-founded acquisition of jurisdiction on any ground empowers a court to decide the entirety of the controversy. *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 629. Upon any hypothesis, therefore, the judgment below is final within the meaning of 28 U.S.C. § 1257, and this Court has jurisdiction to decide the federal questions presented.

(*infra,* pp. 1a-6a). The court began with the premise that the picketing was "concededly peaceful in nature" (*infra,* p. 1a). Its companion premise was that "the Commonwealth has not only the power but the duty to preserve the property of its citizens from invasion by way of trespass . . ." (*infra,* p. 4a). It therefore turned the validity of the peaceful picketing upon the question whether "the parcel pick-up zone and the parking areas constitute private or quasi-public property" (*infra,* p. 4a). It answered that question by its determination that the shopping center had been opened "only to those members of the public who would . . . possibly contribute to the financial success of the venture" (*infra,* p. 5a); the "invitation to the public . . . was limited to those who might benefit Weis' and Logans' enterprises, including potential customers as well as the employees of the shopping center concerns" (*infra,* p. 5a). Since the pickets "certainly were not within the orbit of the class of persons entitled to the use of the property" (*infra,* p. 5a), the picketing, "even though . . . of a peaceful nature, . . . constituted trespass which very properly was restrained" (*infra,* p. 6a). The court fortified this conclusion with its observation that "the pickets were not and never had been employees of Weis" (*infra,* p. 6a). Based on its determination that the picketing was enjoinable as trespass, the court below deemed "it unnecessary to determine whether the instant picketing was for an unlawful purpose" (*infra,* p. 6a), thereby disclaiming the companion ground invoked by the Court of Common Pleas that the picketing was "designed, at least in part, to pressure Weis . . . to compel its employees to join a union" (*supra,* p. 8). The Pennsylvania Supreme Court did not address itself to the question of federal preemption.

Three Justices dissented (*infra*, p. 6a), Mr. Justice Cohen writing a dissenting opinion (*infra*, pp. 7a-11a). Citing this Court's opinion in *A.F.L.* v. *Swing*, 312 U.S. 321, the dissent observed that "'stranger picketing' is . . . constitutionally protected" (*infra*, p. 7a). Citing this Court's opinion in *Marsh* v. *Alabama*, 326 U.S. 501, the dissent reasoned by analogy that, as the shopping center "was open to the public in general and, though privately opened, served a public function, private management could not curtail precious constitutional liberties" (*infra*, pp. 7a-8a). Trespass aside, the dissent continued, "there arises the question of federal preemption" (*infra*, p. 11a). The dissent emphasized that "federal decisions stress the high degree of freedom allowed union activity on the property of the employer" (*infra*, p. 11a). Furthermore, apart from the protected character of peaceful picketing, "restricting picketing to the berm areas at the entrances and exits . . . has overtones of a secondary boycott", for it risks "unlawful and harmful effects . . . to neutral employers . . ." (*infra*, p. 11a). The dissent regretted the failure of the majority opinion to face the "inescapable conflicts" with paramount federal law (*ibid.*).

REASONS FOR GRANTING THE WRIT

Whether peaceful picketing within a shopping center can be prohibited as a trespass is an important and recurrent federal constitutional and statutory question which has provoked a diversity of judicial opinion and should be determined by this Court.

I

Judicial opinion is divided. In conflict with the decision below, the California Supreme Court holds

that peaceful picketing within a shopping center is protected as free speech,[6] and the Washington Supreme Court holds that the conduct is within the domain preempted by the National Labor Relations Board.[7] The Wisconsin Supreme Court rules that, where "the property involved is a multi-store shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a conclusion that the property rights of the shopping center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing."[8] By an equal 4-4 division the Michigan Supreme Court affirmed an order enjoining a shopping center owner from interfering with handbilling within the center;[9] one branch of the court takes the view that a shopping center "is simply a modern public marketplace", no different from "the historic public markets of earlier days", and that the "public outdoor walkways and malls are equally as public during business hours regardless of whether the fee rests with a public or private freeholder",[10] while the other branch of the court takes the view that handbilling to dissuade the consumer from buying nonunion-made clothing "is obviously not consistent with inherent

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[6] *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31*, 40 Cal. Rep. 233, 394 P.2d 921, cert. denied, 380 U.S. 906.

[7] *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 363 P.2d 803.

[8] *Moreland Corp.* v. *Retail Store Employees Union Local No. 444*, 16 Wis. 2d 499, 114 N.W. 2d 876, 879.

[9] *Amalgamated Clothing Workers* v. *Wonderland Shopping Center*, 370 Mich. 547, 122 N.W. 2d 785.

[10] 122 N.W. 2d at 796-797.

property rights. . . ." [11] A lower Maryland court in an excellent analysis bars state interference with peaceful picketing within a shopping center both because the conduct is constitutionally protected as free speech and because it is federally preempted.[12] The question has excited wide commentary ranging the spectrum.[13] Its dimensions have been fully exposed and the issue is ripe for determination by this Court.

II

Prohibition of peaceful picketing within a shopping center as a trespass abridges freedom of speech guaranteed by the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution. The pickets in this case carried signs reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits" (*supra*, p. 5). Communication of this message by picketing is "the dissemination of information concerning the facts of a labor dispute [which] must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill* v. *Ala-*

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[11] 122 N.W. 2d at 793.

[12] *Maryland* v. *Williams*, 44 LRRM 2357 (Md. Crim. Ct., June 10, 1959).

[13] Note, *Shopping Centers and Labor Relations Law*, 10 Stan. L. Rev. 694 (1958); Gould, *Union Activity on Company Property*, 18 Vand. L. Rev. 73, 119-135 (1964); *Keller, Publicity Picketing and Shopping Centers*, 111, Labor Law Developments 1967, 13th Ann. Inst. Lab. Law, Southwestern Legal Found. (1967); Notes, 73 Harv. L. Rev. 1216 (1960); 1960 Duke L. J. 310; 48 Va. L. Rev. 133 (1962); 1962 U. Ill. L. Rev. 475; 3 Bost. Col. Ind. Com. L. Rev. 289 (1962); 49 Va. L. Rev. 1571 (1963); 5 Bost. Col. Ind. Com. L. Rev. 768 (1964). See also, Note, *Regulation of Demonstrations*, 80 Harv. L. Rev. 1773, 1779-81 (1967).

bama, 310 U.S. 88, 102.[14] "Peaceful picketing is the workingman's means of communication" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 293); it is therefore "in part an exercise of the right of free speech guaranteed by the Federal Constitution" (*Building Service Union* v. *Gazzam,* 339 U.S. 532, 536-537).

The court below nevertheless affirms the prohibition of this picketing upon the primary if not sole ground that the pickets had "no right or authority whatsoever to utilize the private property" of the shopping center, and therefore peaceful picketing within it "constituted trespass which very properly was restrained" (*infra,* p. 6a). Peaceful picketing within a shopping center cannot be prohibited on this basis. The property is private but the use is public. A shopping center is a multi-store complex on a large tract of land with access from public ways to a parking area for motor traffic and to sidewalks fronting on the stores for walking. It is open to the customer and the window shopper, to the employees working within the stores and to the employees delivering to the stores, to applicants for employment seeking work and to salesmen seeking to sell their wares to the stores, to the garbage collector and the postman, and to all of the rest of the community that makes the center function. A motorist needs no pass to drive into the center and a pedestrian no leave to walk its streets. The shopping center is a market place whose very being inheres in its openness to the public.

But the court below holds that, unlike the other members of the public, the picket with a labor message

[14] See also, *Chauffeurs Local Union 795* v. *Newell,* 356 U.S. 341.

has not been invited to enter and therefore his unconsented presence is a prohibited trespass. And so it creates a sheltered enclave insulating the businesses within the center from peaceful picketing in front of the premises of the individual store. This special privilege relates solely to the abutment of the store on a street privately owned. A store facing a street owned by the township must bear peaceful picketing at its premises and endure the impact of the message which its disfavored labor policy evokes. Only a store facing a street owned by a private holder is given immunity from peaceful picketing conveying the identical message. Yet no interest relevant to restricting freedom of expression enters by way of the private rather than the public title to the open property on which the picket walks.

A shopping center open to that part of the public which benefits it economically cannot be closed to that part of the public seeking to disseminate an adverse message flowing from the disfavored manner in which a business inside the center operates. The shopping center takes the community in its entirety or not at all. Entry into a "business block" used as a "regular shopping center" in "a company-owned town", this Court held, could not be shut to the distribution of religious literature on the ground that "the title to the property belongs to a private corporation." *Marsh* v. *Alabama*, 326 U.S. 501, 502-503. "We do not agree," this Court explained, "that the corporation's property interests settle the question. . . . Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of

those who use it." *Id.* at 505-506. A facility open to the public, "though private property within the protection of the Fifth Amendment, has no aura of constitutionally protected privacy about it. Access by the public is the very reason for its existence." Mr. Justice Douglas concurring in *Lombard* v. *United States,* 373 U.S. 267, 275. "Fundamentally, the property involved is not 'private' any more. That is why the competing interest of freedom of speech must be served." *Maryland* v. *Williams,* 44 LRRM 2357, 2362 (Md. Crim. Ct. June 10, 1959). When the consumer is invited to buy and the employee hired to work inside the shopping center, the state cannot by injunction bar the worker from informing them by peaceful picketing within the center in front of the store that the place is "Non-Union" and that "these employees are not receiving union wages or other union benefits."

Land ownership by a private holder is as irrelevant as land ownership by a governmental entity when the question is the exercise of free speech on property opened to public entry. This Court has rejected the view that a municipality is empowered blanketly to suppress the expression of First Amendment rights on public grounds because "the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof. . . ." *Hague* v. *C.I.O.,* 307 U.S. 496, 514. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515. When the issue is freedom of speech on grounds otherwise open to the public, it can

make no difference whether title to the property is in a municipality or a private holder. Property interest *per se* is in either case equally insubstantial as a basis for a state court injunction prohibiting the expression of First Amendment rights.

The court below secondarily suggests that the injunction is supportable because in this case "the pickets were not and never had been employees of Weis" (*infra*, p. 6a). This hoary ground is in square conflict with this Court's decision in *American Federation of Labor* v. *Swing*, 312 U.S. 321. This Court answered yes to the question whether "the constitutional guaranty of freedom of discussion [is] infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute" (*id.* at 323). "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's Case*." *Id.* at 326. Paramount federal labor policy is built on the premise that labor activity is not rightfully confined to disputants standing in

the proximate relation of employer and employee (*infra,* pp. 24-25).

Nor is the prohibition of peaceful picketing in front of the store's premises supportable on the ground that the picketing can be conducted at the distant highway entrances to the shopping center. The vicinity of the store is the natural and effective place to communicate the picket's message pertaining to that store and its labor policy. It does not justify denial of communication at that place because picketing can be conducted "at other, admittedly less advantageous, locations off plaintiff's premises." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 923, cert. denied, 380 U.S. 906. ". . .. [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *Irvington,* 308 U.S. 147, 163. "First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop." Mr. Justice Black concurring in *N.L.R.B.* v. *Fruit and Vegetable Packers,* 377 U.S. 58, 80. Furthermore, picketing at distant places, with the concomitant difficulty of confining the message and the response to the store at which it is directed, risks enveloping others to their detriment in a controversy in which they are unconcerned (*infra,* p. 27).

The nub of the matter was laid bare by the California Supreme Court in upholding the right of peaceful picketing inside a shopping center at the premises of the disfavored store. *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31, supra.* "The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing

at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage." 394 P. 2d at 926. The ingredients in peaceful picketing which differentiate it from pure speech do not justify suppression of its message at the natural and effective place of its dissemination in the name of naked title to property.

III

1. Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the National Labor Relations Board. Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection. . . ." Peaceful picketing publicizing a lawful position is a preeminent expression of protected activity. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 62. Thus, prohibition of secondary labor pressure carries the express reservation that nothing in that ban "shall be construed to make unlawful . . . any primary strike or primary picketing." NLRA, § 8(b)(4)(B); *Steelworkers* v. *N.L.R.B.,* 376 U.S. 492, 498-499. Similarly, in regulating organizational and recognition picketing, Con-

gress has with certain qualifications explicitly excepted from prohibitory reach "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." NLRA, § 8(b)(7)(C). In the absence of the "requisite clarity" this Court refused to read into the "congressional plan" a purpose "to proscribe all peaceful consumer picketing at secondary sites" aimed at the identified product of a disfavored firm. *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 63. And so, unless clearly within the restraint which the Act itself imposes, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters,* 346 U.S. 485, 500. The scrupulousness of Congress and this Court reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 63.

It is therefore clear that a state court enters "the pre-empted domain of the National Labor Relations Board insofar as it enjoin[s] . . . peaceful picketing. . . ." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139. The circumstance that peaceful picketing is conducted within a shopping center does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution " 'belongs to the usual administrative routine' of the Board." [15] In a variety of contexts private property has been required to yield

[15] *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 130.

to the statutory guaranty of protected concert.[16] "We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression."[17]

Commitment of the question to initial determination by the NLRB is illustrated by that agency's court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.*, 98 NLRB 88, 93, enforced as modified, 200 F. 2d 375 (C.A. 7). A large retail department store is bisected at ground level by a street owned by the store, known as Holden Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377); "It is open to the public for pedestrian use" (98 NLRB at 93). The Court of Appeals for the

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[16] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Company's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.*, 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.*, 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.*, 362 F. 2d 716, 722 (C.A. 2).

[17] *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2), cert. denied, 376 U.S. 951.

Seventh Circuit enforced the NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

Commitment of the question to initial determination by the NLRB is further illustrated by relating the shopping center situation to the standard expressed by this Court in *N. L. R. B.* v. *Babcock & Wilcox,* 351 U.S. 105. An employer may refuse to permit distribution of union literature by nonemployee union organizers on a company-owned parking lot "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. Unlike a shopping center, however, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 926. The public character of the shopping center is crucial. To prohibit peaceful picketing on otherwise open property is to hold that a "'theoretical invasion" of property suffices of itself to suppress speech at the natural and effective place of its communication (*id.* at 924).

The *Babcock & Wilcox* standard supports no such result.[18]

Furthermore, banning peaceful picketing on otherwise open property implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry into the shopping center of every element of the public except that part of the community with a labor message directed at and adverse to a store within the center is invidious. The court below justifies this discriminatory debarment on the explicit ground that the invitation to enter extends "only to those members of the public who would be potential customers and possibly would contribute to the financial success of the venture." (*infra*, p. 5a). Conversely, therefore, it excludes other members of the public who by peaceful picketing "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute" (*Thornhill* v. *Alabama*, 310 U.S. 88, 104). That differentiation makes the exercise of free speech the point of distinction in determining what part of the public to exclude from

[18] In a decision adopted by the NLRB in the absence of exceptions to it, an NLRB Trial Examiner aptly articulated the rationale: "Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers." *Arlan's Dept. Store of Charleston*, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965.

property otherwise generally open. The *Babcock & Wilcox* standard bars that discrimination.[19]

The NLRB is thus not ousted of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing simply because the picketing is conducted on the private but open property of a shopping center. It is the NLRB's business in the first instance to accommodate a claimed collision between recourse to protected activity and the use of private property. Peaceful picketing inside a shopping center is no exception.

2. The secondary reason by which the court below justifies the prohibition of peaceful picketing—that "the pickets were not and never have been employees of Weis" (*infra*, p. 6a)—likewise conflicts fundamentally with the federal scheme. Section 2(3) of the National Labor Relations Act states that the term "employee" "shall not be limited to the employees of a particular employer," and section 2(9) of the Act defines a "labor dispute" to mean any labor-affected controversy "regardless of whether the disputants stand in the proximate relation of employer and employee." "The broad definition of 'employee' . . . as well as the definition of 'labor dispute' . . .

[19] A privately-owned meeting hall in a company town was ordered opened to a union upon the same terms extended to others where even-handed access to the hall had been denied the union. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226. " 'It is not every interference with property rights that is within the Fifth Amendment . . . .' " *Id.* at 232; *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 802, n. 8 In *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, in sustaining the contested picketing as primary and protected, this Court treated as irrelevant the fact that "the picketed gate . . . was located on property owned by New York Central Railroad and not upon property owned by the primary employer" (*id.* at 499).

expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer.' " *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U.S. 177, 192. The retrogressive confinement of a labor dispute to an employer and his employees adopts a standard that Congress has repudiated.

When Congress in 1959 addressed itself with particularity to so-called stranger picketing, it acted with discriminate care to accommodate competing interests. Section 8(b)(7) of the Act, added in 1959, regulates organizational and recognition picketing. Congress did not prohibit such picketing but determined instead how and when it may be conducted. The picketing in this case informed the public that the disfavored store was "Non-Union" and "these employees are not receiving union wages or other union benefits" (*supra*, p. 5). This picketing is arguably either within or outside the scope of section 8(b)(7)(C). It might be construed as picketing to cause acceptance or selection of the picketing union by the store employees as their representative. In that event the picketing becomes an unfair labor practice where it has been conducted without a representation petition "being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . ." If a timely petition is filed an expedited election is conducted to determine whether or not the union is the employees' majority choice as their representative. But picketing will not be prohibited despite the failure to file a representation petition, and an expedited election will not be con-

ducted even if a petition is timely filed, if the picketing falls within the scope of the final proviso to (C):

> Nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by another person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Furthermore, the picketing would not be within the scope of section 8(b)(7) at all if it is construed as a protest against substandard employment terms, undermining the prevailing area standards, unrelated to the attainment of an immediate organizational or recognition object.[20]

It is thus apparent that to say that "the pickets were not and never have been employees of Weis" is by itself not even relevant to determining the permissibility of the picketing in which they engaged. That picketing may be altogether within the protected domain; it may be subject to limited restraint; and it can be reached only in accordance with the standards and pursuant to the means prescribed by the Act. "Peaceful stranger picketing by a labor organization in the course of a labor dispute is therefore an activity subject to injunction only through the procedures authorized in the Act, and, if not so condemned, is protected by Congress against injunctive prohibition arising outside the Act." *Aetna Freight*

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[20] *Houston Building and Construction Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321.

Lines v. *Clayton,* 228 F. 2d 385, 388 (C.A. 2), cert. denied, 351 U.S. 950.

3. The court below requires that peaceful picketing aimed at the disfavored store inside the shopping center be conducted at the distant highway entrances to the center (*infra,* p. 2a, n. 4). This divorcement of the picketing from the immediate locale of the store conflicts with the accommodation that Congress has made between protected primary activity and prohibited secondary pressure. The result of relegating the picketing to entrances serving the entirety of the shopping center is that, despite punctilious efforts at the removed locations to confine the message to the disfavored store, customers may be dissuaded from buying and employees from working at *other* establishments inside the center because of unwitting belief that the shopping center as a whole is the object of protest, thereby unnecessarily drawing others into a controversy not their own. The picketing union, on the other hand, is not only ousted from the natural and effective place of picketing; it is also subjected to the risk that its conduct will be found to be secondary because of the entanglement of others and the unintentional failure to confine the message as nearly as possible to the disfavored store. The court below thus artificially creates a secondary situation in conflict with the adjustment that the federal scheme contemplates.

Congress sought to reconcile "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies

not their own." *N. L. R. B.* v. *Denver Bldg. Trades Council,* 341 U.S. 675, 692. One preeminent means by which that end is achieved is to picket the primary employer at his immediate premises which he solely occupies and at which he conducts his regular business. *Local 761, I. U. E.* v. *N. L. R. B.,* 366 U.S. 667; *Steelworkers* v. *N. L. R. B.,* 376 U.S. 492, 498-500. The court below destroys the confinement of picketing to the "geographically restricted area near" the primary employer's premises "in a manner traditional in labor disputes"[21] by precluding picketing at that place and removing it instead to the distant highway entrances serving others as well as the primary employer. It therefore forces the creation of a common situs and compels recourse to the standards which prevail where the primary and neutral employers occupy the same premises and where the picketing at the shared premises is primary only "if it meets the following conditions" (*Moore Dry Dock Co.,* 92 NLRB 547, 549; *Local 761, I. U. E.* v. *N. L. R. B.,* 366 U.S. 667, 676-677):

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Comparatively nice refinements of time, place, and circumstances determine adherence to or departure from the standards for picketing at a common situs.

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[21] *N.L.R.B.* v. *International Rice Milling Co.,* 341 U.S. 665, 671.

On the one hand, picketing at the access to a shopping center housing many establishments obviously opens the union to the risk of a finding that "the union did not attempt to minimize the effect of its picketing, as required in a common situs case, on the operations of the neutral employers utilizing the market." *Local 761, I. U. E.* v. *N. L. R. B.*, 366 U.S. 667, 678-679; *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856, enforced, 249 F. 2d 591 (C.A. 9). On the other hand, if the picketing at the common situs is otherwise primary, it is of no moment that neutral employers may suffer because the picketing, though properly circumscribed, may nevertheless envelop their operations.[22] For, "however severe the impact of primary activity on neutral employers, it . . . [is] not thereby transformed into activity with a secondary objective." *National Woodwork Manufacturers Assn.* v. *N. L. R. B.*, 386 U.S. 612, 627.

The upshot is that the court below removes the picketing from its natural primary habitat, subjects the union to the resultant risk that its picketing at shared entrances will be found to be secondary because not sufficiently circumscribed, and needlessly embroils neutral employers by exposing them to picketing in a controversy not their own. The decision below is therefore faithless to the congressional reconciliation of protected primary picketing and prohibited secondary pressure.

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[22] *Local 761, I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 673-674; *N.L.R.B.* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2); *Sales Drivers* v. *N.L.R.B.*, 229 F. 2d 514, 517 (C.A.D.C.), cert. denied, 351 U.S. 972; *N.L.R.B.* v. *Local Union No. 55*, 218 F. 2d 226, 230 (C.A. 10); *Seafarers International Union* v. *N.L.R.B.*, 265 F. 2d 585, 590, 591 (C.A.D.C.).

4. The elements of the controversy thus place its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245. Heedless of this principle, the court below "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioner." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139.

IV

But even if the court below is empowered to adjudicate the controversy, its decision conflicts with federally protected rights and therefore cannot stand. Peaceful picketing at the premises of a disfavored employer informing the public that the employer is "Non-Union" and "these employees are not receiving union wages or union benefits" is concerted activity for mutual aid or protection. It does not lose its protected status because it is conducted on private property open to the public. Prohibition of the picketing on the ground that the participants in it are not employees of the disfavored employer repudiates Congress' premise that protected concerted activity extends beyond an employer and his employees. And relegation of the picketing to distant entrances shared by others results in the twin evils of destroying the right to picket at the primary employer's premises and of exposing neutral employers to picketing in a controversy not their own. Accordingly, in prohibiting peaceful picketing safeguarded by the National Labor

Relations Act, Pennsylvania by the common law formulated and enforced by its judiciary "has forbidden the exercise of rights explicitly protected by § 7 of that Act"; "a state law which denies that right cannot stand under the Supremacy Clause of the Constitution." *Division 1287, Amalgamated Association* v. *Missouri,* 374 U.S. 74, 83.

V

This Court has expressly refrained from passing upon the question whether peaceful picketing at "stores, located in suburban shopping centers," can be enjoined as " 'trespassing upon . . . property' " because "the picketing occurred on land owned by or leased to respondent though open to the public for access to the stores." *Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20, 24-25. It is time to face the question. "The suburban movement in America has been accompanied by a revival of the all-purpose market, recast in the form of the shopping center, a planned arrangement of individual retail units on a single large tract."[23] "By the end of 1966, there will be between 10,000 and 11,000 shopping centers in the United States and Canada, and these shopping centers will account for almost $79 billion in annual sales —or approximately 37 percent of the total retail sales in the United States and Canada. From 1964 through 1966 shopping centers enjoyed an annual increase of more than 2 percent per year in the share of total retail sales. If that growth rate continues through 1970, shopping centers will then account for more than 45 percent of the total retail sales. By the end

[23] Note, *Shopping Centers and Labor Relations Law,* 10 Stan. L. Rev. 694 (1958).

of 1966, more than $25 billion will have been invested in the United States and Canada. An obscure but perhaps interesting figure is that these shopping centers at the end of this year will provide almost 12 million parking spaces for cars."[24] The importance of peaceful picketing at the scene of the dispute within the shopping center is self-evident. The present unsettled state of the law is a serious and vexing impediment to the exercise of that right.[25] Determination of the ground rules by this Court is essential.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

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[24] *Keller, Publicity Picketing and Shopping Centers,* 111, 112, *Labor Law Developments 1967,* 13th Ann. Inst. Labor Law, Southwestern Legal Found. (1967). The source of these statistics is Kaylin, *A Profile of the Shopping Center Industry,* Chain Store Age, May 1966.

[25] "Suburbs pose new organizing problems as unions expand drives. Just entering suburban shopping centers, where the owner controls accesses and parking lots, can be tough for organizers of the Retail Clerks Union and the Hotel and Restaurant Employees Union. The clerks have won several 'trespass cases' in state courts, but, says a spokesman, it's tough 'hedgerow fighting.'" Wall Street *Journal,* June 13, 1967, p. 1, col. 5.

APPENDIX